In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 423

ERNEST NIGHTINGALE AND FRANK STRINGI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. C) and of the district court (Pet. App. A) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1967 (Pet. App. B). The petition for a writ of certiorari was filed on July 26, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court erred in refusing to grant to two petitioners a separate trial as to each of a series

of transactions involving the forging and uttering of United States savings bonds.

RULES INVOLVED

The Federal Rules of Criminal Procedure provide:

> Rule 8: (a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
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> (b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.
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> Rule 14: If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. * * *

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners Nightingale and Stringi were found guilty

under a multiple count indictment charging conspiracy and substantive offenses in the forging and uttering of three sets of United States savings bonds, in violation of 18 U.S.C. 495 (Stringi App. 3a, 6a–14a, 16a–31a).[1] On May 13, 1966, petitioners were committed, as authorized by 18 U.S.C. 4208(b), for the preparation of a study as a basis for determining the sentence to be imposed on counts 1 and 23. Imposition of sentence was suspended as to the other counts (Nightingale App. 62a; Stringi App. 46a). On appeal the convictions were affirmed.

Prior to the trial the court denied petitioners' motion for a separate trial with respect to each of the three sets of bonds (Stringi App. 33a–34a). This objection was later renewed in Nightingale's motion for acquittal, joined in by Stringi, and was overruled (Stringi App. 2a–3a, 35a).

The evidence may be summarized as follows:

1. Bonds registered in the name of Hammond were negotiated on February 26, 1963, at the First National Bank of Berlin, Pennsylvania, of which Nightingale was a director (App. 2b, 8b). Horovitz, whom both petitioners knew (App. 13b–15b, 19b), was induced by Stringi to forge Hammond's endorsement on the bonds and was introduced by Nightingale to bank officials, who cashed the bonds (App. 4b–9b, 17b–19b, 21b–22b). From the proceeds, $1,000 was received by Stringi and $26,254.40 was placed in the savings ac-

[1] "Stringi App." and "Nightingale App." refer to the appendices filed by the petitioners, respectively, in the court of appeals. "App." refers to the appendix of the appellee in that court.

count of Nationwide Construction Company, from which Stringi was authorized to make withdrawals (App. 10b–11b). Stringi paid Horovitz $500 (App. 22b).

2. Endorsements upon bonds registered in the name of Stofcheck were forged by codefendant Cochran, at the request of Stringi (App. 24b–28b, 30b). In an unsuccessful attempt to cash the bonds at a Rockwood bank, Nightingale introduced Cochran to a bank official as Mr. Stofcheck (App. 29b–30b). At the Berlin bank the bonds, totaling $9,409.37, were cashed on March 28, 1963 (App. 30b–31b). Nightingale directed a bank employee to put $3,000 of the proceeds in a joint checking account for Stringi and Nightingale. Nightingale received $1,000 in cash and a cashier's check in the amount of $5,409.37 for the balance (App. 31b). The following day Stringi gave this cashier's check to Cochran who cashed it, retained $1,000 for himself, and delivered the balance to Stringi (App. 31b–34b).

3. Bonds registered in the name of Stellitano were negotiated on May 9, 1963, at the Cambria Savings and Loan Association, Somerset, Pennsylvania (App. 40b). Stellitano's dorsement was forged on the bonds by Vento at the request of Nightingale who introduced Vento to a bank official as Stellitano (App. 38b–39b, 49b–51b). Nightingale directed the distribution of the $8,186.01 received for the bonds (App. 42b, 43b). The sum of $5,836.01 was deposited in a savings account in Stringi's name; $500 was deposited in Nightingale's savings account; a $500 money order

was given to Nightingale; and the remaining $1,350 was paid in cash to Vento (App. 42b–43b).

ARGUMENT

The court below did not err in refusing to grant petitioners' request for a severance. The charges arose out of a related series of transactions, were of a similar character, and constituted parts of a common scheme. All three transactions involved the forgery and uttering of United States savings bonds and occurred with a 3½ month period in the same rural area. A common *modus operandi* was employed, with Stringi obtaining the services of the forger, Nightingale being present at the banking institution to vouch for the spurious identity of the forger, and Nightingale and Stringi sharing in the proceeds of the bonds after paying part of the money to the forger. While there were additional co-conspirators as to each set of bonds, the two petitioners were involved in each of the transactions charged. Accordingly, under Rule 8, F.R. Crim. P., there was as to petitioners no misjoinder either of defendants or counts in the indictment. Furthermore, no prejudice warranting relief under Rule 14, F.R. Crim. P., was shown by petitioners. Petitioners' reliance on *McElroy* v. *United States*, 164 U.S. 76, is misplaced since in that case, unlike this, no count linked all the defendants. See *Schaffer* v. *United States*, 362 U.S. 511, 516.[2]

[2] Nor is there any conflict with the lower court cases cited by petitioners (see Pet. 6), all of which are distinguishable. In *Ingram* v. *United States*, 272 F. 2d 567 (C.A. 4); *Metheany* v. *United States*, 365 F. 2d 90 (C.A. 9); *Ward* v. *United States*, 289 F. 2d 877 (C.A. D.C.); *Cross* v. *United States*,

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1967.

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335 F. 2d 987 (C.A. D.C.); and *King* v. *United States*, 355 F. 2d 700 (C.A. 1), the offenses improperly joined were in no way connected and were not part of the same series of transactions constituting the offenses charged. In *United States* v. *Spector*, 326 F. 2d 345, 350 (C.A. 7), where a conspiracy count had been joined with substantive counts, the acts concerning the alleged conspiracy had ended before those constituting the substantive offenses began.

U.S. GOVERNMENT PRINTING OFFICE: 1967